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No. 611

In The
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1957

GEORGE H. TAYLOR, MAUDE T. MONTGOMERY, MARIE A. LEITCH and JULIA M. TAYLOR
Appellants

v.

THE COMMONWEALTH OF KENTUCKY
Appellee

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

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THE COMMONWEALTH OF KENTUCKY
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

JURISDICTIONAL STATEMENT

(a) Opinion Below

Ky, 302 SW2 583, is the official citation. The opinion was rendered under the style of George H. Taylor, etc. v. Commonwealth of Kentucky, etc., and a copy is annexed as Appendix A.

(b) Jurisdiction

(i) In 1941, invoking the Forfeiture Act of 1906 (KS 4076b-4076k, Kentucky Code of 1936), copied in Appendix C, the Commonwealth forfeited to itself for non-payment of taxes all right, title and interest of appellants and others under a Virginia land grant of 1797. The originating petition, duly verified by affidavit, named two non-resident corporations as defendants, but all other claimants under the patent were described as "unknown". In fact, however, the identity and post-office address of appellant George H. Taylor were known, as well as a partly correct account of his title, and the affidavit was false. Under Article 2, Kentucky Civil Code of Practice, copied in Appendix D, all unknown defendants were thereafter ignored, there being nothing on which the Warning Order Attorney could base investigation nor any advertisement or other publication except posting a copy of the petition at the front door of the courthouse as provided by the Forfeiture Act. In October, 1954, appellants, all of them residents of Virginia, first discovered the existence of these proceedings. In May, 1955, they duly applied to be admitted parties thereto and for consequential relief. Application was wholly denied on the grounds of laches, although delay was due to the fact that the false affidavit prevented the notification required by Article 2, § 59 (2), Civil Code of Practice.

(ii) March 15, 1957, is the date of the judgment appealed from and of its entry.

June 21, 1957, is the date of the order of the Court of Appeals of Kentucky, overruling appellants' petition for rehearing.

September 16, 1957, is the date on which appellants' Notice of Appeal to this Court was filed in the

Clerk's Office of the Court of Appeals of Kentucky.

(iii) This Court's jurisdiction to review the judgment below on appeal is conferred by 28 USC 1257(2).

(iv) The following cases sustain the jurisdiction:
Walker v. City of Hutchinson, 352 US 112;
Nelson v. New York, 352 US 103;
Covey v. Town of Somers, 351 US 141;
Mullane v. Central Hanover, 339 US 306;
Dahnke-Walker v. Bondurant, 252 US 282.

(v) The statutes whose application is challenged are copied in Appendices C and D.

(c) Questions Presented

The following questions are presented by this Appeal:

1. Whether the taking by the Commonwealth of Kentucky of appellants' properties herein involved was, on the facts presented in the Record, a deprivation of their property without due process under the Fourteenth Amendment of the United States Constitution.

2. Whether the taking by the Commonwealth of Kentucky of appellants' properties herein involved was, on the facts presented in the Record, a denial of equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

3. Whether Article 2, Kentucky Civil Code of Practice,

dealing with Constructive Service, and § 4076d, Kentucky Code of 1936, dealing with Assessment of Old Land Grants, are repugnant to the United States Constitution as they were applied by the Commonwealth of Kentucky in taking appellants' properties herein involved under the circumstances and on the facts presented in the Record, in that such application results in a deprivation of property without due process and denies appellants equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

or in sum, narrowing the question to the precise facts of the case:

4. Whether the application of the Kentucky statutes for constructive service may, consistently with the Due Process and Equal Protection clauses of the Fourteenth Amendment, be justified on the ground of laches on the part of a non-resident owner of real estate when the Commonwealth has forfeited it for non-payment of taxes in proceedings in which the owner is deprived of notice or knowledge by constructive service based on a false affidavit that his identity, interest and post-office address are unknown, so that his ignorance of the existence of the proceedings is responsible for the delay in the assertion of his rights with respect to such real estate.

(d) Statement of the Case[1]

Appellants, who have always been residents, not of Ken-

[1] Appellee has not filed any pleading of any kind in opposition to appellants' demand since the latter first moved for admission as defendants in the case at bar in 1955. Accordingly, the facts outlined under this head are undisputed.

tucky, but Virginia, own the outstanding title to the so-called Haskell grant, a Virginia patent of 1797 for 300,000 acres in Pike, Floyd, Knott and Letcher Counties in Kentucky.

§ 4076d of the Kentucky Forfeiture Act of 1906[2] empowers and directs the Commonwealth's Attorney of any county embracing all or a part of an "old land grant" to bring suit to forfeit the whole for non-payment of taxes. "Owners and claimants" under the grant are to be made defendants, by name if known, otherwise as "unknown". In addition to the regular requirements of the Civil Code of Practice respecting process, a copy of the originating petition must be posted at the front door of the courthouse, which when done "shall be deemed notice to all defendants" (§ 4076d). Judgment of delinquency is to result in forfeiture, whereupon title to the patent immediately vests in the Commonwealth.

Simultaneously, however, so much of the patent as is in the possession of "occupants" who meet the conditions of § 4076g is transferred to them and they are vested with the title forfeited. But § 4076h provides that all of the patent not so vesting in "occupants" is to be sold at auction, excess proceeds over costs and the taxes due going to the "owner or claimant".

In 1907 Kentucky proceeded under the Act against a portion of the Haskell grant and twenty-one other tracts. The portion of the Haskell grant proceeded against lies in Pike County. This suit, hereafter called the *Pike County suit*, was entirely distinct from the case at bar. Judgment of

[2] Appendix C

forfeiture was affirmed in 1911 by this Court in Kentucky Union v. Kentucky,[3] on constitutional grounds.

The originating petition in the Pike County suit made appellant George H. Taylor a party defendant. It mentions him by name several times, his interest or title is (though imperfectly) described and his nearest post office is given as Norfolk, Virginia.

Besides appellant Taylor, the petition makes defendant six other persons interested in the Haskell patent. The place of residence of one of them is stated to be unknown; for the rest no closer address is supplied than Philadelphia, Detroit and the cities of Washington and New York.

Nearly thirty-five years later, in 1941, Pen-Ken and Duke-Whitney companies, claiming the entire patent, brought an action of ejectment and for damages in the Federal Court against Warfield Natural Gas Company.[4]

Early in its course the defendant apparently realized that the judgment of forfeiture in the Pike County suit, geographically limited as it was to that county, was pro tanto unsatisfactory. It accordingly seems to have procured the institution of the case at bar (hereafter called the *Floyd County suit*) against the Pen-Ken and Duke-Whitney companies and all other "owners" or "claimants". These last were described as unknown. The proceeding resulted in an order entered May 2, 1941, which forfeited the entire patent to the Commonwealth.

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[3] 219 US 140

[4] Decided adversely to plaintiffs in Pen-Ken v. Warfield, 137 F2 871 (6th Cir., 1943)

Exhibit XII, fastened to page 35 of the typewritten record, contains the petition and the order of forfeiture in the Pike County suit. Comparing them with the corresponding papers in the Floyd County suit shows that the latter were to a considerable extent copied word for word from the former;[5] indeed, the copying was done with great discrimination and care.

As already stated, the Pike County suit gave full details as to appellant George H. Taylor; in fact (as he testified on pages 38, 39 and 41 of the typewritten record) he could and can still be reached at Norfolk, Virginia, the same post office mentioned in the petition in that case. It follows, of course, that the petition in the Floyd County suit was false when it included Taylor as an unknown defendant, owner or claimant only. As required by § 58,[6] Kentucky Civil Code of Practice, and § 4076d of the Forfeiture Act, the Commonwealth's Attorney verified the petition by affidavit.

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[5]Compare

Pike Petition		*Floyd Petition*
Paragraph 1	with	Paragraph 1
Paragraph 81, last part	with	Paragraph 14, last part
Paragraph 88, last part	with	Paragraph 12
Paragraph 95, last part	with	Paragraph 14
Paragraph 96	with	Paragraph 15
Paragraph 97	with	Paragraph 16
Pike Order		*Floyd Order*
Paragraph 5	with	Paragraph 5
Paragraph 6	with	Paragraph 6
Paragraph 7	with	Paragraph 7
Paragraph 52	with	Paragraph 11

Note: The paragraphs were originally not numbered. For convenience, however, numbers have been inserted in pencil in the printed matter of Exhibit XII and in the typewritten pages of the rest of the record.

[6] Appendix D

The Civil Code of Practice does not provide for advertisement and except for the posting required by § 4076d of the Forfeiture Act there was in this case no publication of any kind and of course, since there was nothing for the Warning Order Attorney to investigate, no other notice. Consequently, though appellant George H. Taylor could still be reached at the post office stated in the Pike County petition, he received (as he testified) no notification of the Floyd County suit and like his sisters (the other appellants) remained in complete ignorance of its existence until October, 1954 at the earliest.

In May, 1955, appellants formally moved the trial court for admission to the Floyd County suit as parties defendant and for consequential relief. Their motion was denied on the stated grounds of laches.

Raising and Disposition of Federal Question

Pursuant to Rule 75.07(1), Kentucky Rules of Civil Procedure,[7] the record certified and transmitted by the clerk of the trial court to the court below included appellants' Statement of Points to be Relied on on Appeal. It is found on page 59 of the typewritten record as follows:

> "1. The Court erred in denying appellants' application to be made parties defendant.
>
> "2. The Court erred in holding the order of forfeiture of May 2, 1941, was valid although
>
> "(a) Appellant George H. Taylor was, through fraud and false swearing, denied notice of these

[7] Appendix E

proceedings at their institution and was thus fraudulently attempted to be made a party by constructive service only as a party alleged to be unknown;

and although

"(b) The Statute which was the sole basis of these proceedings, namely, the Forfeiture Act of 1906 (Section 4076b and following, Ky. Stat. 1936 ed.) had been repealed by Ch. 21, Acts of Kentucky Assembly of 1938, 1st Special Session.

or alternatively

"3. The Court erred in imputing to Appellants laches in moving for the judgment of sale authorized and directed by Section 4076b and following, Ky. Stat. 1936 Ed., although through the fraudulent service described in paragraph 2(a) above, they had no notice or knowledge of these proceedings prior to October, 1954, at the earliest.

"4. In thus denying Appellants their right to such judgment of sale the Court erred in depriving them of their property without due process of law in violation of the constitutions of the Commonwealth and of the United States."

The court below affirmed the judgment of the trial court, holding appellant George H. Taylor guilty of laches. It pointed out that he should have averred and proved not only that, as was not denied, he did not know of the existence of the Floyd County suit but that "by ordinary diligence or reasonable inquiry" he could not have known of it. The matters chiefly relied on in support of this position

were "that the Commonwealth was endeavoring, through the Forfeiture Statute, to wipe out the old Virginia patents", the "notoriety" of Pen-Ken v. Warfield[8] and the fact that Taylor had taken part in the Pike County suit.[9]

(e) The Questions are Substantial

Appellants are non-resident owners of Kentucky lands. Under the old law this was constitutional contact justifying posted or advertised notice. Mullane v. Central Hanover,[10] however, has substituted for the former rigid classification into proceedings in personam, in rem, etc., a standard more flexible and better adapted to existing realities of procedural due process. Such standard might be described as the behavior of an honest, though perhaps somewhat close, business man genuinely interested in informing as many persons as in the circumstances he reasonably can of what it is he wants them to know.

Thus tested, the conduct that deprived appellants of all knowledge of the existence of the Floyd County suit falls far short.

In the first place, it was merely dishonest. So characterized, it perhaps requires no comment beyond referring to

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[8] 137 F2 871 (1943), cited in note 4 above. This of course was a decision of the Court of Appeals for the Sixth Circuit, whereas appellants are residents of the Fourth.

[9] In 1947 Taylor moved in the Pike County suit to enforce his right of sale at auction under § 4076h of the Forfeiture Act. The motion was finally denied in Taylor v. Com., Ky 246 SW2 981 (1951). The opinion, copied in Appendix B, holds that Taylor's admitted right to sale under the section mentioned and to a share in the proceeds had been lost by laches on his part.

[10] 339 US 306.

the vigorous local condemnation not unnaturally visited on like behavior in the Kentucky case of Logsdon v. Logsdon.[11]

In the second place, none of the practical difficulties dealt with in the Mullane case exist. Only seven persons were mentioned in the Pike County petition as interested in the Haskell patent and the post-offices of only six of them were known. To write to them all would have been no trouble. In any event, had the Warning Order Attorney had the addresses he needed to begin investigation, § 59(2) of the Civil Code of Procedure[12] required him to make diligent effort to reach the parties thus disclosed. In the process he must inevitably have notified Taylor at Norfolk—and through him the other appellants.

In the third place, to post a copy of the Floyd County petition at the courthouse door in a small mountain town like Prestonsburg, the county seat, is evidently even less satisfactory as indirect notice than advertisement in a newspaper.

There is thus no question that the standard underlying the Mullane decision condemns the conduct appellants are complaining of. And its doctrine has received important extension in the last year or two.[13]

---

[11] 204 Ky 104, 263 SW 728, 730 (1924): divorce plaintiff greatly simplified his case by a false affidavit that his wife was a non-resident whose address he did not know.

[12] Appendix D.

[13] Covey v. Somers, 351 US 141, is an interesting illustration. Written notice of tax foreclosure to a local land-owner, known to the municipal taxing authorities to be mentally incompetent, was condemned as violative of due process. The other side of the coin is Nelson v. New York, 352 US 103: written notice, kept from the land-owner only by the dishonesty of his own employee, held constitutionally sufficient to warrant tax foreclosure.

Also significant is the fact, already pointed out, that for the purposes of procedural due process it rejected irrelevant distinctions between proceedings in rem, quasi in rem, and in personam. Consequently, it was immaterial whether beneficiaries of the common trust fund under consideration in the Mullane case were residents or no. And its rationale has been extended impartially to tax foreclosure[14] and condemnation,[15] domains in which the prerogative rights of the sovereign are traditionally strong.

Thus it seems inconceivable that the rule of Huling v. Kaw Valley[16] should continue to be approved. As was significantly pointed out in the Walker case,[17] the decision was rendered nearly 70 years ago. Moreover, although in the Walker case (the land-owner being resident) there was no need to discuss the Huling rule, the latter is clearly inconsistent with the reasoning of the Mullane case, largely based (as it was) on the reliability of the mails:

> "The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. . ."[18]

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[14] Covey v. Somers and Nelson v. New York, preceding note.

[15] Walker v. Hutchinson, 352 US 112; Wisconsin v. Milwaukee, 352 US 948.

[16] 130 US 559: in land condemnation newspaper advertisement against a named *non-resident* owner satisfied constitutional requirements for due process.

[17] Please see note 15.

[18] 339 US at page 319.

Putting to one side the fact that fraud alone prevented the Warning Order Attorney from notifying appellants by letter as the statute requires, application of the Huling rule to the case at bar creates arbitrary differences amongst the citizens of the country. The efficiency of the mails is not affected by crossing state lines. To support the judgment below draws a distinction between residents and non-residents of Kentucky that, however traditional, is without foundation in reality.

It also, of course, emphasizes the in rem aspects of the case at bar in a way that in the light of the Mullane case can no longer be justified in theory.[19]

The opinion below is no answer. It imputes laches but this is to beg the question, which of course is not whether Taylor ought to have discovered the existence of the case but whether, under the Constitution, the Commonwealth ought to have notified him of it in writing, as indeed but for the false affidavit would have been done. The opinion ignores this and besides its general inclination to decide against Taylor[20] might perhaps accurately be summarized as holding that notice is due least of all to the person having the greatest interest.

THE QUESTION THUS PRESENTED is at least as substantial as those in the Mullane, Covey, Nelson, Walker

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[19] The rules of *general* due process have already been applied to the Forfeiture Act and to a similar West Virginia statute: Kentucky Union v. Kentucky, 219 US 140(1911), and King v. Mullins, 171 US 404(1898). They permit confiscation for tax liability only after hearing or its constitutional equivalent.

[20] See also the earlier opinion in Taylor v. Com., copied in Appendix B.

and Wisconsin cases, all reviewed on appeal. Moreover it is certainly of general importance that Huling v. Kaw Valley and the cases it represents should no longer be allowed to interfere with the logical and practical consequences of the Mullane case.

Respectfully submitted

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APPENDIX A

THE ORDER APPEALED FROM

THE COMMONWEALTH OF KENTUCKY,
THE COURT OF APPEALS
Winter Term, March 15, 1957

GEORGE H. TAYLOR, et al.,

v.

COMMONWEALTH OF KENTUCKY
Floyd Circuit Court

The Court being sufficiently advised, it seems to them there is no error in the judgment herein

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

It is further considered that the appellee recover of the appellants its cost herein expended.

A Copy-Attest:

Doris Owens, C.C.A
Edward K. Bryan, D.C.

Appendix A

Issued:

June 21, 1957

ORDER—KENTUCKY COURT OF APPEALS

Spring Term, June 21, 1957

TAYLOR, et al.,

vs.

COMMONWEALTH

Floyd

The Court being sufficiently advised, it is considered that the Petition of Appellants for a Rehearing, be and the same is overruled.

THE OPINION

Taylor v. Commonwealth,

March 15, 1957,

Ky, 302 SW2 583

Cullen, C.: In 1941 the Commonwealth brought an action in the Floyd Circuit Court, under K. S. 4076b to

4076k (since repealed), to forfeit for nonpayment of taxes the title or claims of persons to a tract of 300,000 acres lying in Floyd, Pike, Knott and Letcher Counties, under the Haskell Patent of 1797. The Pen-Ken Gas and Oil Corporation and the Duke-Whitney Gas and Oil Company were named defendants, and all unknown owners or claimants also were made defendants. Judgment of forfeiture was entered, but no sale was adjudged as contemplated by K.S. 4076h.

In 1955 George H. Taylor and his sisters, professing to have been owners under the Haskell Patent and therefore included within the designation of unknown owners in the action above mentioned, filed a motion in the Floyd Circuit Court to compel a sale of the land in accordance with K.S. 4076h. The court entered an order overruling the motion, on the ground of laches. Taylor and his sisters have appealed from that order.

A full understanding of the situation, as concerns the question of laches, requires a reference to former proceedings in the Pike Circuit Court. In 1907 the Commonwealth brought an action in the Pike Circuit Court, under K.S. 4076b to 4076k, to forfeit claims under a number of patents, including so much of the Haskell Patent as lay in Pike County. (All of the Haskell Patent could have been forfeited in that action, but the pleadings and judgment designated only the portion lying in Pike County.) George H. Taylor was named as a party defendant in the action, and he appeared and defended. Judgment of forfeiture was entered, but no sale was ordered. Forty years later, in 1947, Taylor moved the Pike Circuit Court for an order of sale. The circuit court overruled the motion and on appeal, this Court affirmed, holding that Taylor was barred by laches. See *Taylor* v. *Commonwealth, Ky.*, 246 S.W. 2d 981.

Another action of some significance was one brought in the Federal District Court, in 1941, by the Pen-Ken Gas and Oil Corporation versus the Warfield Natural Gas Company. In that action Pen-Ken asserted title under the Haskell Patent, and maintained that the judgment in the forfeiture action in the Pike Circuit Court, in 1907, was void. The district court held that the forfeiture judgment of the Pike Circuit Court was valid, and on appeal to the Circuit Court of Appeals this holding was affirmed, in a comprehensive opinion. See *Pen-Ken Gas and Oil Corporation* v. *Warfield Natural Gas Company*, 137 F. 2d 871. (As a matter of interest it may be noted that the Circuit Court of Appeals held that the entire Haskell Patent, including the portions in Floyd, Knott, Letcher Counties, had been forfeited in the Pike County action.)

The factors which resulted in Taylor being held to be barred by laches from moving for a sale in the Pike County case are set forth in *Taylor* v. *Commonwealth, Ky.*, 246 S.W. 2d 981. We consider all of those factors to be present in the instant case, with the exception of actual knowledge by Taylor of the forfeiture judgment in Floyd County, for a substantial period of time before he moved for a sale. Taylor asserted, in the hearing on his motion, that he had not acquired knowledge of the Floyd County judgment until a few months before he moved for sale.

Ordinarily, actual knowledge on the part of the complainant, of the alleged invasion of his rights of which he complains, is necessary in order to charge him with laches. However, knowledge may in some circumstances be imputed to him by reason of opportunity to acquire knowledge, or where it appears that he could have informed himself of the facts by the exercise of reasonable diligence, or where the circumstances were such as to put a man of

ordinary prudence on inquiry. 19 Am. Jur., Equity, sec. 505, pp. 350, 351. See also, *Hite's Heirs* v. *Hite's Ex'rs,* 40 Ky. 177; *Kirby* v. *Jacobs,* 52 Ky. 435.

When it is considered that Taylor was put on notice in the Pike County action that the Commonwealth was endeavoring to forfeit claims under the Haskell Patent, and that the Commonwealth was endeavoring, through the forfeiture statute, to wipe out the old Virginia patents; that an action had been brought in the Federal District Court and appealed to the Circuit Court of Appeals, necessarily with some degree of notoriety, in which claims were asserted to the entire Haskell Patent; that the judgment in the Floyd County action was of record constituting a simple source of knowledge; and that, as far as this record shows, Taylor for a period of 50 years, and his predecessors in title for a period of 100 years, had taken no affirmative steps of any kind to assert ownership of the lands covered by the Haskell Patent, we think it was encumbent upon Taylor, in making his motion in the instant action, to aver something more than a mere lack of actual knowledge of the Floyd County judgment. We think the circumstances were such as to require him to show that he could not have acquired knowledge by ordinary diligence or reasonable inquiry. Comparison may be made with the rule governing the granting of a new trial on the ground of newly discovered evidence, which requires the movant to show not only that he was not aware of the evidence, but that reasonable diligence would not have disclosed it.

It is our opinion that the lower court properly overruled the Taylor motion on the ground of laches.

The judgment is affirmed.

APPENDIX B

Taylor v. Commonwealth

Ky, 246 SW2981 (1951)

Stanley, C.: In 1907 the Commonwealth of Kentucky filed its petition in equity in the Pike Circuit Court against numerous defendants, including George H. Taylor, of Norfolk, Virginia, seeking to forfeit their title to the land described in the petition (aggregating over 750,000 acres) upon the ground that the defendants had failed to list the property for taxation and to pay the taxes thereon in compliance with the provisions of Chapter 22 of the Acts of 1906 (Kentucky Statutes, 1936 Edition, Sections 4076b to 4076k, inclusive), relating to the assessment of old land grants. On February 14, 1908, a judgment of forfeiture was entered, but the case was retained on the docket for further proceedings. Several of the defendants appealed, and the judgment was affirmed. Eastern Kentucky Coal Lands Corp. v. Commonwealth, 111 S.W. 362, 33 Ky. Law Rep. 857. The constitutionality of the Forfeiture Act of 1906 had been upheld in Eastern Kentucky Coal Lands Corp. v. Commonwealth, 127 Ky. 667 106 S.W. 260 and the Kentucky Union Co. v. Commonwealth, 128 Ky. 610, 108 S.W. 931, 110 S.W. 398, 33 Ky. L. R. 9, 587. The decisions were affirmed in Kentucky Union Co. v. Kentucky, 219 U. S. 140, 55 L. Ed. 137, 31 S. Ct. 171.

Section 4 of the Forfeiture Act gives the owner of any of the forfeited grants the right to redeem the land by paying 50 years' taxes after having established title sufficient to support an action of ejectment. Section 6 provides

that all titles forfeited to and vested in the Commonwealth and not purchased back by the owners or claimants as provided in Section 4, shall be transferred to and vested in any person for so much thereof as such person has had the actual adverse possession for five years next preceding the judgment of forfeiture under the claim or color of title, and who shall have paid the taxes thereon. Section 7 provides that all title to land vested in the Commonwealth and not purchased back by the owner or claimant as provided in Section 4 and not vested in the occupant as provided in Section 6 shall be sold to the highest and best bidder for cash. After the payment of the costs of the action and the taxes, the remainder shall be paid over to the former owner or claimant or his personal representative or assigns.

The judgment of forfeiture entered on February 14, 1908, concluded as follows: "All other questions not here specifically adjudged are reserved for further adjudication." No further steps are taken in the case until May 10, 1947, when George H. Taylor, a defendant in the 1907 suit, filed a motion in the Circuit Court asking for an order of sale of land described in the petition as Tract No. 21, known as the Haskell patent, as was prayed in the original petition of the Commonwealth. It was described as:

> "All that part that is situated in Pike County, Kentucky, West of the top of the ridge that divides the waters of Levisa Fork from the waters of Tug Fork of Sandy River, of that certain tract or parcel of land, containing 300,000 acres by survey bearing date the 28th day of November, 1795, granted by the Commonwealth of Virginia to Benjamin Haskell, by letters patent bearing date the 16th day of February, 1797. * * * "

The Commonwealth set forth a number of reasons why the motion should be overruled. The Court overruled the motion on the ground that was barred by the statute of limitations and by laches. Taylor then brought mandamus proceedings in this Court against the judge of the Pike Circuit Court to require him to enter the order of sale, but mandamus was refused as not being the proper remedy. Taylor v. Stephenson, 309 Ky, 68, 215 S. W. 2nd 947. He has now appealed from the order overruling his motion.

In the forfeiture of lands in Leslie County, Kentucky Union Co. v. Commonwealth, 128 Ky. 610, 108 S.W. 931, 110 S.W. 398, 33 K.L.R. 9, 587, affirmed 219 U. S. 140, 31 S. Ct. 171, 55 L. Ed. 137, the judgment did not order a sale. A motion similar to that made in the case at bar was overruled by the Circuit Court. In an original proceeding, this Court directed the trial judge to enter the order for the sale of the entire body of land. Davidson v. Lewis, 159 Ky. 798, 169 S. W. 538. (See for distinction in procedural rights or remedies, Taylor v. Stephenson, supra.) Naturally, the appellant relies upon the Davidson case. The different states of fact distinguish it from the present one. There Davidson moved seasonably. The apparent purpose of not ordering a sale at the time the judgments in both cases were rendered was to await final determination of the constitutionality of the act. The opinion of the Supreme Court affirming our decision of constitutionality was delivered January 3, 1911. Making allowance for time necessary for the filing of the mandates here and in the Leslie Circuit Court and for further proceedings, Davidson moved without delay. He filed his action in this Court in the summer of 1914. But Taylor waited until May, 1947, or thirty-nine years after the judgment of forfeiture in his case became final. Therein lies the difference. Upon that difference this case turns.

Though perhaps not necessary, it seems desirable in the interest of full disposition of the case to dispose of certain contentions of the Commonwealth.

It appears that at a special term of the Pike Circuit Court in 1911 the judge, on the call of the docket, wrote the word "off" beside the name of the case. Striking a cause from the docket does not dismiss it or result in loss of jurisdiction. It merely removes the case from the active docket, and leaves it subject to being reinstated. Hayes v. Baker, 237 Ky. 265, 35 S. W. (2d) 296; Goff v. National Rubber and Leather Co., 249 Ky. 363, 60 S. W. (2d) 944. Further proper proceedings in the case may be seasonably taken.

We do not accede to the argument that the appellant, Taylor, may not be heard because he has no interest in the land forfeited and is but a volunteer seeking to have it sold. The Commonwealth made him a party defendant and described the interest he was claiming. He made a defense by special and general demurrers. It is inconsistent now for the Commonwealth to claim that he never had any interest or any right to have had his claim adjudicated.

The Commonwealth argues that appellant lost all rights by the repeal of the Forfeiture Statute. It is not necessary to decide if it was constitutionally repealed. We think the right of the appellant as a party to the suit, whatever it might have been, was vested by the judgment and could not be abrogated or extinguished by a repeal of the statute. KRS 446.110; Baldwin v. Commonwealth, etc. 74 Ky. 417, 11 Bush 417; Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 Fed. 871, 882; 50 A. Jur., Statutes, Sec. 526.

It is conceded that nearly all of the Haskell patent tract

had been appropriated and titles of various occupants perfected by possession. But the appellant says that, "Lying in between these large tracts of land were and still are numerous relatively small and irregular parcels, principally along the mountain ranges, which were not owned by any of the local people, being the so-called vacant parcels, title to which was forfeited to the Commonwealth" by the judgment. He charges that mining and oil development companies have appropriated and developed these parcels without hinderance from anyone because of the failure of the Court to order a sale. Further, that there is no way in which the title may be recovered or taxes thereon collected except by a sale in accordance with the provisions of the Forfeiture Act. The Commonwealth, of course, concedes that the title of the occupying claimants was not affected by the forfeiture and seems also to agree that there were some parcels, title to which would have passed by the sale and the net proceeds have gone to the unoccupying claimants. Under this state of fact it would appear that Mr. Taylor should have shown that there was some unoccupied land unredeemed and have identified it. However, that very point was the justification offered by Judge Lewis in the proceeding in which this Court required him to enter the order of sale in Davidson v. Lewis, supra. The statute was construed in that opinion as contemplating that the whole body of land forfeited should be sold, the purchasers, and not the occupants, being required to show in actions to recover under their purchase that the land claimed by them was not of the excluded class. However, the opinion in the Kentucky Union case, 128 Ky. 610, 108 S.W. 931, 110 S. W. 398, stated that after final judgment of forfeiture it might be to the interest of the Commonwealth to sell only certain parts as prescribed by the Court. See Pen-Ken Gas & Oil Co. v. Warfield Natural Gas Co., 137 F. 2d 871, op. cit.

887, a case of special interest involving the very judgment we have here. We need not go into the apparent conflict in construction. Whether here it should be the one or the other, the controlling consequence of delay by the appellant in moving for an order of sale would be the same.

The judgment in this suit, as provided by Sec. 5 of the Act, decreed that title to the land embraced "is now transferred to and vested in the Commonwealth." We are not now concerned with the right to relief of any occupying claimant. Other defendants, (such as was the appellant Taylor), or those in privity with them could have obtained relief by asserting their claims before or during the term at which the judgment of forfeiture was entered and offering to purchase the land back by paying taxes, etc. Sec. 4. It was further provided that all title and claim to land not so purchased back by the owner or claimant or not vested in an occupant "shall be sold to the highest and best bidder for cash in hand." After payment of taxes, costs, etc., the balance was payable "to the former owner or claimant or his personal representatives or assigns." Sec. 7. The appellant claims this provision as to sale is mandatory and that such sale should yet be had. Without such action, the title to the land, which was not recovered, remained vested in the Commonwealth.

The Commonwealth did not follow up the prayer of its petition that such unredeemed titles and claims be sold. It may have been that its representatives understood that there was nothing left to be sold or that what was left was of little value. It was probably because the primary objective of the statute and the proceeding had been accomplished. Whatever the reason, the Commonwealth then had a judgment forfeiting the land and held title thereto. The appellant

would shift all responsibility to the state for not selling the uncleared titles. He and the other claimants of his class had a right to have those titles sold and the proceeds distributed. It was to their greater interest that it should be done and it was incumbent upon them to seek affirmative relief if desired. The appellant now asserts that right which existed then and continued to exist for a reasonable time thereafter. Such a step was timely taken in the Leslie County case of Davidson v. Lewis, supra, 159 Ky. 798, 169 S. W. 538. Mr. Taylor's omission has given rise to the present situation.

The appellant, of course, had full knowledge of the facts and the law governing the suit. A party may abandon a particular proceeding to enforce a cause of action or legal right. Abandonment may be implied or presumed from his acts and conduct or omissions. "It is generally held that a long and unexplained delay raises a presumption of abandonment which may justify the Court in refusing to allow further prosecution of an action even though there is no intention to abandon." This may be determined by the facts and circumstances of the particular case. 1 C. J. S. Actions, Secs. 138, 139. This Court has recognized that a party by his voluntary conduct may abandon the enforcement of a judgment in his favor and be deprived of a right to make a claim under it. Seeley v. Mitchell, 85 Ky. 508, 4 S. W. 190. Due deligence is demanded of a party in the prosecution or defense of an action. Childers v. Potter, 291 Ky. 478, 165 S. W. 2d 3.

In White v. Horn, 224 Ill. 238, 79 N. E. 629, 115 A. S. R. 155, creditors of a decedent's estate sought to have an order of sale of his real property enforced more than 23 years after it had been entered. They offered as an excuse for the

long delay that the lands were worth nothing in the market until recently when they had greatly advanced in value. The Court held that the judgment of sale had given the creditors a lien but that it could be and was "lost by gross laches or unreasonable delay." Following the analogies of the law, declared without legislation, and the policy of "repose and security of titles and estates against dormant claims" the judgment denying the execution of the order of sale was affirmed.

In Carr v. Cleland (Tex. Civ. App.) 86 S. W. 2d 858 where a party had failed to question a judgment, for 30 years, during which time it had stood on record as a muniment of title in a defendant from who others had acquired rights to the land, it was held that the failure of the plaintiff to proceed seasonably operated to induce the belief that he had acquiesced in the same and that his silence and inaction had worked an abandonment of his rights.

The abandonment by the defendant, Taylor, of an unadjudicated or unconsummated claim of right, and his acquiescence in the failure of the Commonwealth to take further steps to have the land sold, created a new right in the Commonwealth. Cf. Mendendes v. Holt, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526. It is the right of repose. This is the essential basis of the doctrine of laches. As observed by Mr. Justice Brewer in Halstead v. Grinnan, 152 U. S. 412, 38 L. Ed. 495, 14 S. Ct. 641; The defense of laches "prevents the breaking up of relations and situations long acquiesced in, and thus induces confidence in the stability of what is, and a willingness to improve property in possession; and at the same time it certainly works in furtherance of justice, for so strong is the desire of every man to have the full enjoyment of all that is his, that when a party comes

into Court and asserts that he has been for many years the owner of certain rights, of whose existence he has had full knowledge and yet has never attempted to enforce them, there is a strong persuasion that, if all the facts were known, it would be found that his alleged rights either never existed, or had long since ceased."

In that case the plaintiff sought the aid of a Court of equity to set aside a survey alleged to have been inaccurate. Laches was held a good defense since it had stood unchallenged for over 25 years and all the facts alleged in the suit were known to the plaintiff for more than 20 years before the suit was brought.

Mr. Justice Harlan in Lansdale v. Smith, 106 U. S. 391 27 L. Ed. 219, 1 S. Ct. 350, declared that in every case it is a question that appeals to the conscience of the Court, and that since long acquiescence and laches by parties out of possession of property taken over by another are productive of much hardship and injustice to others, it will not be excused except by showing some actual hindrance or impediment caused by fraud or concealment of the party in possession. See cases of defective foreclosure of a mortgage, Martin v. Gray, 142 U. S. 236, 35 L. Ed. 997, 12 S. Ct. 186, and New Orleans National Banking Association v. LeBreton, 120 U. S. 765, 30 L. Ed. 821, 7 S. Ct. 722.

The rule of laches is discussed at some length in Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 803, 196 S. W. 2d 429. As therein stated: "Time is only one element in the doctrine of laches. In some cases it is the prime or controlling element, e. g., in the assertion of a long standing claim that has become stale through the passing of the years, with a loss of evidence or obscuration of the

facts. In other cases, as in this one, the lapse of time may be brief, but the injurious consequences of the delay may be great."

The appellant contends that the rule of laches cannot apply because the state as the only adverse party has not been prejudiced by the delay; that purchasers at a sale under the judgment and the statute would now acquire, as they would have then, only such title and rights as the Commonwealth had, and that they alone may raise the question laches. We cannot agree. We think to grant the motion would result in great prejudice and injustice to the Commonwealth.

In considering the matter of time and prejudice, a bit of background is helpful.

The history and chaotic conditions of titles in Eastern Kentucky and the evils sought to be cleared and overcome are interestingly described in the original case of Eastern Kentucky Coal Lands Corp. v. Commonwealth, supra, 127 Ky. 667, 106 S. W. 260, 108 S. W. 1138. The objective of the legislation was to confirm titles of those who had fought the wilderness, built their homes and settled the land, and to get rid of the old land grants which were being held in terrorem over the occupants by persons who had never taken or undertaken actual possession and had paid no taxes. These non-occupants had a strangle hold on this vast area. The overlapping and conflicting titles had stifled and all but prohibited the development of the natural resources. All this was a matter of grave concern to the Commonwealth. There had been studied efforts since the separation from the mother state of Virginia to clear up the situation. These appear in the several constitutions of the state and in legislative acts which were held unconstitutional. See War-

field Natural Gas Co. v. Ward, 286 Ky. 73, 149 S. W. 2d 705. Finally, through the exercise of its sovereign power of taxation, the state succeeded by this constitutional legislation in bringing order out of chaos.

Since the judgment, cities and towns have been built, the country has been populated, a trunk line railroad has been constructed, millions of dollars have been spent in the development of coal and other natural resources of this vast area. The 300,000 acres lying between Tug River and Levisa Fork, in which the appellant now claims an interest and seeks to have sold, is in the heart of it. Titles have changed hands, upon the faith of this judgment of forfeiture. Title examinations have disclosed that there was no sale of the forfeited titles and it could well be assumed as a consequence that there were no outstanding claims based on the Virginia grants. Purchasers were entitled to assume that the forfeited titles had vested under Sec. 6 of the Act and that no cloud on the titles would thereafter be created by a sale of the forfeited lands.

The appellant's belated motion burrows deep into the foundation upon which all the titles rest. If sustained, it would put a question mark upon every title. Valuable equities of innocent parties intervened while the appellant remained asleep. It may be that there are some isolated parcels that were not recovered from the forfeiture by the claimants and were the subject of sale. But they would have to be identified. Further procedure would upset many titles. Obscuration of evidence would probably be the rule rather than the exception. And there were claimants of an interest in the Haskell patent othern than the appellant. To open up the case now, after more than 40 years, would be to open up a gigantic Pandora's box. That which the Com-

monwealth, acting as sovereign of all the people, achieved through the travail of years of legislation and litigation, namely, clearing the confusion of titles, would in a large measure, be lost. The Commonwealth has the same sovereign power now to represent the people to conserve the accomplishment. The policy of the state is to stabilize titles. Upon that rests security and prosperity, a matter of primary concern. How then can it be said that the element of prejudice to the Commonwealth is lacking so that the rule of laches should not apply and the presumption of an abandonment and acquiescence by the appellant should not prevail?

In Pen-Ken Gas and Oil Corp. v. Warfield Natural Gas Co., supra, 137 Fed. 2d 871, the appellant, claiming to own all the land embraced in this very Haskell grant of Virginia, sued the appellee to recover the land and for judgment for $70,466,900 for the value of gas taken therefrom. It sought to have the Court hold that the judgment we have here was void. The Court held it to be valid in every particular. In the course of the opinion, Judge Elwood Hamilton, an eminent Kentucky jurist, speaking for the Court, said: "After a lapse of thirty-two years, appellant asked the Court to declare the judgment of forfeiture void and restore to it the land that has long since passed to others under the forfeiture decree * * *. It would be trifling with justice now to take land away from those who acquired title to it through the decree of forfeiture and give it to appellant freed from the Commonwealth's claim against appellant and its predecessor in title for thirty-two years' taxes on such an issue."

Our conclusion of the whole matter is that the failure of the appellant, George H. Taylor, to assert within a reasonable time his claim of right to have the unredeemed portions

of the land sold and further proceedings taken under the judgment of forfeiture entered February 4, 1908, estops him from doing so now. The trial Court, therefore properly overruled the motion.

The judgment is affirmed.

Judge Combs not sitting.

APPENDIX C

Kentucky Statutes §§4076b-4076k

(Forfeiture Act of 1906)

ARTICLE III.

Assessment of Old Land Grants

§ 4076b. Relating to land title; old land grants.—It shall be the duty of each and every owner or claimant of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905; and if the said owner or claimant, or those under whom he claims, has failed to list said land, or any part thereof, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the

manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided.

The fact that said land has been listed for taxation, or the taxes have been paid thereon, by another claimant, shall not relieve against the duty herein imposed.

If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were, or should have been, made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall be cause for the forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall, within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged, and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes. (1906, c. 22, p. 88, Art. III, § 1.)

§ 4076c. Assessment made on application of owner.—The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition verified by himself or his agent, filed in said court, on or before January 1, 1907, in which the land sought to be charged shall be described, so as to be identified, and the years for which it was not listed and the years in which the taxes were not paid shall be stated, and in which also shall be stated the grant under which he claims, if he derives title from a grant, and the instrument through or the manner in which the title developed upon him. Said application shall be set for hearing upon a day to be fixed by the applicant, not less than ten nor more than twenty days after the filing of the petition, of which he shall give at least ten days' written notice to the county attorney, whose duty it shall be to attend said hearing and represent the state and county; for which service he shall receive as compensation ten per centum (10%) of the amount ultimately collected by sale or otherwise, by virtue of such delinquency.

It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered, having due regard to the value of adjacent property as of said dates, and to ascertain the amount of unpaid taxes which the applicant and those under whom he claims should have paid for any and all of said years, whether assessments were originally made as of said dates or not. Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and state purposes at the rates fixed by law for such years; and shall cause a record of the findings to be made on the order book of the court, and certified to the auditor of the

state and county clerk. Should the court find that the land has been assessed against such owner or claimant, or those under whom he claims, as of any of said dates, it shall accept such assessment as a basis upon which to ascertain the amount of unpaid taxes for the year such assessment may have been made.

Either the petitioner or the Commonwealth, feeling aggrieved by the finding of the county court, shall have the right to take an appeal, within thirty days after the entry of the finding of the county court, to the circuit court for said county, in the manner that other appeals are taken, except that no bond shall be required of the Commonwealth.

It shall be the duty of the circuit court to hear and determine said application de novo, and to give it precedence over all other civil business in said court. The finding of the circuit court shall be conclusive and not subject to appeal. A copy of the findings shall be certified to the auditor of the state and to the clerk of the county court.

As soon as the time for appealing from the finding of the county court has expired, if no appeal is taken, or as soon as the final order of the circuit court is entered, if an appeal is taken, the obligation of said owner or claimant to pay taxes therein called for, with interest and penalties, as provided by law for the redemption of land sold for the non-payment of taxes, shall be complete; and the same shall be paid to the sheriff of the county within thirty days thereafter: Provided, however, That if in a proceeding hereunder begun within the time herein allowed, the amount payable by the delinquent shall not be finally determined until within less than thirty days before March 1, 1907, or until after said date, then the right of forfeiture as set out

in § 4076b of this article shall not be complete in the Commonwealth, unless and until said delinquent shall have failed to pay said amount, interest and penalties, for thirty days after the entry of said order.

Upon collecting said taxes, interest and penalties, the sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the auditor of the state and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. Out of the amount so paid, there shall be paid to the county attorney ten per centum (10%) thereof and an additional ten per centum (10%) to the Commonwealth's attorney, should an appeal have been prosecuted to the circuit court. (1906, c. 22, p. 88, Art. III, § 2.)

§ 4076d. Suit by Commonwealth's attorney; appeal.— If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in §§ 4076b and 4076c of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the circuit court of the county in which said land or any part thereof lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as the unknown owners and claimants thereof, for the purpose of declaring

the title or claim of said defendants forfeited to this Commonwealth, and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable.

In addition to the requirements of the Civil Code of practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the courthouse, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object.

The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described.

The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth.

Such judgment shall operate as a transfer to, and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff.

Judgments rendered by the circuit court under his article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subject to the provisions of Civil Code §§ 391, 410, 414 or 574. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

Either party may prosecute an appeal from such judgment to the court of appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the court of appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth. (1906, c. 22, p. 88; Art. III, § 3.)

§ 4076e. Defendant may pay taxes; procedure.—If, before or during the term of the circuit court next succeeding the term at which a judgment of forfeiture may have been

entered, as authorized by § 4076d of this article, any of the said defendants, in privity with the title so forfeited to, and vested in the Commonwealth, file his counter-claim in said action, accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform, the judgment that the court may enter upon such counter-claim, and in said counter-claim offer to purchase back from the Commonwealth the title and claim in said action so forfeited to, and vested in, the Commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon proper pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged, and that ought to have been charged, against the defendant and those under whom he claims, as the owner or claimant of said land, for the fifty years immediately preceding the filing of such counter-claim; and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth, to enter a judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of said land, for said fifty years, together with interest thereupon at the rate of fifteen per cent (15%) per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable attorney fee from the Commonwealth's attorney, to be fixed by the court: Provided, That no person except a defendant, and no defendant, except as herein provided, shall be allowed to purchase back from the Commonwealth the title so forfeited to, and vested

in it, except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself, upon which he could maintain an action of ejectment.

If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter a judgment re-transferring to such defendant the title and claim so forfeited to, and vested in, the Commonwealth; and said judgment shall have the effect of re-transferring and vesting same in said defendant without the execution of a deed or other instrument.

Should such defendant not thereupon pay said judgment, the court shall thereupon enter an order directing the sale of the said title and claim as in § 4070h of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions hereunder; and the remainder, if any, shall be paid to the state and county as provided in this article, and the counter-claim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fee for the Commonwealth and county attorney, to be fixed by the court.

If at any time during the pendency of said action it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk is insufficient, additional security shall be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counter-claim shall be dismissed.

Appeal may be prosecuted to the court of appeals from the judgment of the circuit court under this section within

the time and in the manner and subject to all the conditions provided for appeals in § 4076d of this article, except that the judgment of the circuit court as to the amount thereof shall be final and not subject to appeal.

All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the auditor of the state and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of taxes collected by him: Provided, That fees required by law to be paid to the auditor shall be paid to him by the sheriff, and by the auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the Commonwealth's attorney in all proceedings under this article for which he shall be allowed the per centum as herein provided. Certified copies of the judgments of the circuit court, under §§ 4076d and 4076e hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies and indexed as deeds are required to be indexed. (1906, c. 22, p. 88, Art. III, § 4.)

§ 4076f. When owner can not purchase.—Any owner or claimant who instituted a proceeding allowed by § 4076c of this article, and who did not, within the time herein limited, pay the amount therein ascertained as charged or chargeable against him and those under whom he claims, as the owner or claimant of said land, shall not be allowed the right to purchase back, under the proceedings authorized by § 4076e of this article, such title or claim so forfeited to, and vested in, the Commonwealth. (1906, c. 22, p. 88, Art. III, § 5.)

§ 4076g. Title, in whom vested.—All title and claim proceeded against under this article and forfeited to, and vested in, the Commonwealth and not purchased back by the owner or claimant thereof, as authorized in § 4076e hereof, whether such forfeiture be for past delinquencies or for future delinquencies as authorized under § 4076k hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereupon for the five years in which such possession may have been or may be held; and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land. (1906, c. 22, p. 88, Art. III, § 6.)

§ 4076h. Sale of land title to which has vested in state.—All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant, as provided by § 4076e and not vested in the occupant, as provided in § 4076g shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the courthouse on the first day of some regular term of the circuit or county court, after notice of sale shall have been advertised in the manner required by law in the case of the sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when confirmed, the court shall order the commissioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and

claim to the land so forfeited and transferred to, and vested in, the Commonwealth as remains in it after the operation of § 4076g of this article, and shall so recite.

The money realized from said sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including commissioner's fee as fixed by law and a reasonable attorney's fee, to be fixed by the court and paid in the manner provided by law; second, to the county and state the proportion to which each may be entitled, together with interest and penalty as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representative or assigns. (1906, c. 22, p. 88, Art. III, § 7.)

§ 4076i. Limitation of actions.—No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto. (1906, c. 22, p. 88, Art. III, § 8.)

§ 4076j. Owner or claimant; payment of taxes and penalties.—No owner or claimant of any land in this Commonwealth shall be allowed to prevent the operation of this article by the payment, after January 1, 1906, of any amount less than the whole of the unpaid taxes, interest and penalties provided by law, that were charged, and that should have been charged, against said owner or claimant of said land and those under whom he claims, as of each and all of said five dates, first mentioned in § 4076b hereof; and where such payment is made after the passage of this act, the amount to be paid shall be ascertained, and payment made, as in this article provided. (1906, c. 22, p. 88, Art. III, § 9.)

§ 4076k. Failure for five years to list; effect of.—When for any five successive years after the first day of August, 1906, any owner or claimant of or to any land in this Commonwealth shall fail to list same for taxation and cause himself to be charged with the taxes properly chargeable thereon, or fail to pay the same as provided by law, then such failure shall be cause for the forfeiture of his title and claim thereto, and the transfer of the same to, and vesting it in, the Commonwealth of Kentucky. And whereever such failure exists, it shall be the duty of the Commonwealth's attorney to institute an equitable action in the circuit court of the county wherein the said land, or a part thereof, lies, for the purpose of declaring said forfeiture and vesting said title and claim thereto in the Commonwealth of Kentucky, and for the sale of such parts thereof as, under the provisions of this article, are liable to sale. Such actions and proceedings pertaining thereto shall conform to the provisions of this article as far as the same may be applicable. (1906, c. 22, p. 88, Art. III, § 10.)

APPENDIX D

§§ 57-60 Kentucky Code of Civil Procedure

ARTICLE 2

Constructive Service

§ 57 Constructive service; warning order. If the defendant be—

1. Non-resident corporation. A corporation having no agent in this State, known to the plaintiff, upon whom a summons can be lawfully served; or,

2. Non-resident person. A non-resident of this State and believed to be absent therefrom; or,

3. Person who has left State to defraud. Have departed therefrom with intent to delay or defraud his creditors; or,

4. Absence from State four months. Have been absent therefrom four months; or,

5. Leaving county to avoid service. Have left the county of his residence to avoid the service of a summons; or,

6. Concealment to avoid service. So conceal himself that a summons cannot be served upon him; or,

7. Warning order; when to be made. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of section 58, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order.

§ 58 Affidavit for warning order; effect of. 1. Clerk to have affidavit before making. The clerk shall not make such warning order upon any of the grounds mentioned in subsections 1, 2, 3, 4, and 7, of section 57, except upon an affidavit of the plaintiff; or of his agent or attorney, if he be absent from the county, or of his guardian, curator, committee, or next friend, if he be under disability; or of the attorney of either of them, if absent from the county,

stating the ground of the application for such order.

2. What affidavit shall state. Nor shall the clerk make such order on any of the grounds mentioned in subsections 1, 2, and 4, of section 57, unless the affidavit also state in what country the defendant, or, if the defendant be a corporation, in what country its chief officer or agent resides or may be found, and the name of the place wherein a post-office is kept nearest to the place where the defendant or its chief officer or agent resides or may be found; or unless the affidavit state the affiant's ignorance of such of those facts as he does not know.

3. Affidavit of agent or attorney. Nor shall the clerk make such order upon an affidavit of an agent or attorney of the plaintiff, stating any of the grounds mentioned in subsections 1, 2, 4, and 7, of section 57, unless the affidavit state the affiant's belief that the plaintiff is ignorant of such of the facts as are unknown to the affiant.

4. Affidavit or return on summons necessary. The clerk may make such order upon an affidavit of the plaintiff, or of his agent or attorney if he be absent from the county; or of his guardian, curator, committee, or next friend, if he be under disability; or upon the return of a summons by the proper officer, stating either of the grounds mentioned in subsections 5 and 6, of section 57.

5. What affidavit of agent or attorney must state. But the clerk shall not make such order upon the affidavit of an agent or attorney unless it also state the affiant's connection with the plaintiff, and the fact that he is absent from the county.

6. Affidavit; when evidence. An affidavit made pursuant

to the foregoing provisions of this section, unless it be controverted by the defendant's affidavit, shall be sufficient evidence of the facts therein stated for the support of the action as well as of the warning order.

§ 59 Attorney; appointment, duties, compensation. 1. Clerk to appoint attorney. The clerk, at the time of making such warning order, shall appoint, as attorney for the defendant, a regular, practicing attorney of the court; but the court may, and for any reason which it deems good shall, appoint another attorney as a substitute for the attorney appointed by the clerk. Neither the plaintiff nor his attorney shall be appointed, or be permitted to suggest the name of, the defendant's attorney.

2. Duty of attorney and report by. Such attorney must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him, and must report to the court, during the first term, which does not commence within sixty days after his appointment, the result of his efforts.

3. Powers of attorney limited. The duties and powers of such attorney are governed by the last foregoing paragraph unless he be employed by the defendant; or unless he be unable to inform the defendant concerning the action; or unless he learn that the defendant is under disability, other than coverture, or other than infancy and coverture combined.

4. Employment of attorney; effect of. Such attorney, if employed by the defendant, shall so report to the court; and

such report shall be treated as an appearance of the defendant in the action.

5. Affirmative defense; when attorney to make. If such attorney cannot inform the defendant concerning the action, or if he learn that the defendant is under disability, other than coverture, or other than infancy and coverture combined, he shall so report to the court, and shall make an affirmative defense if he can; or, if he cannot make such defense, he shall so report to the court, and shall be subject, with reference to such report, to the provisions of subsection 3 of section 36; and no act of his shall be treated as an appearance of such defendant.

6. Compensation of attorney. The provisions of subsection 4 of section 38 apply with reference to the compensation of such attorneys.

7. Judgment when not to be rendered until defense or report made. No judgment shall be rendered against such defendant if under any disability, other than coverture, or infancy and coverture combined, until a defense or report shall have been filed pursuant to subsection 5 of this section.

§ 60 Defendant deemed summoned, when; effect. A defendant against whom a warning order is made and for whom an attorney has been appointed shall be deemed to have been constructively summoned on the thirtieth day thereafter, and the action may proceed accordingly.

APPENDIX E

RULE 75.07. RECORD TO BE PREPARED AND TRANSMITTED BY CLERK.

(1) Necessary Parts: The clerk of the circuit court shall prepare and certify a true copy of the matter designated by the parties, except as provided in Sections (2) and (3), but shall always include, whether or not designated, copies of the following: The material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the commissioner's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957
No. 611

GEORGE H. TAYLOR, MAUDE T. MONTGOMERY, MARIE A. LEITCH and JULIA M. TAYLOR,
Appellants

v.

COMMONWEALTH OF KENTUCKY - Appellee

MOTION TO DISMISS APPEAL

JO M. FERGUSON
Attorney General of Kentucky

WILLIAM F. SIMPSON
Assistant Attorney General
Counsel for Appellee
Commonwealth of Kentucky
Frankfort, Kentucky

I hereby certify that I have served a true copy of the within motion on the Appellants by mail by depositing the same in a United States Post Office with first class postage prepaid and addressed to counsel of record at their post office addresses, to-wit: Alexander H. Sands, American Building, Richmond, Virginia, Littleton M. Wickham, American Building, Richmond, Virginia and H. V. Forsyth, Ashland, Kentucky, Counsel for Appellants.

This the 12th day of December, 1957.

William F. Simpson
Assistant Attorney General
Frankfort, Ky.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 611

GEORGE H. TAYLOR, MAUDE T. MONTGOMERY, MARIE A. LEITCH AND JULIA M. TAYLOR - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION TO DISMISS APPEAL

Appellee, Commonwealth of Kentucky, moves the Court to dismiss the appeal herein on the grounds that it does not present a substantial Federal question; that the Federal question sought to be reviewed was not timely or properly raised, or expressly passed on, and that the judgment rests on an adequate non-federal basis. Rule 16.

Preston v. Chicago, Ill.,
226 U. S. 447, 57 L. Ed. 293

Wood v. Chesborough,
228 U. S. 672, 57 L. Ed. 1018

Davidson v. New Orleans,
96 U. S. 97, 24 L. Ed. 616

French v. Taylor,
199 U. S. 274, 50 L. Ed. 189

O'Connor v. Texas,
202 U. S. 501, 50 L. Ed. 1120

Elder v. Wood,
208 U. S. 226, 52 L. Ed. 464

O'Neil v. Vermont,
144 U. S. 323, 36 L. Ed. 450

J. Bacon & Sons v. Martin,
265 U. S. 380, 83 L. Ed. 233

Seaboard Air Line Ry. Co. v. Watson,
287 U. S. 86, 77 L. Ed. 180

Radio Station WOW v. Johnson,
326 U. S. 120, 89 L. Ed. 2092

McGoldrick v. Compagnie Generale Transatlantique,
309 U. S. 430, 84 L. Ed. 849

Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission,
297 U. S. 471, 80 L. Ed. 810

Cox v. Texas,
202 U. S. 446, 50 L. Ed. 1099

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Frankfort, Kentucky.

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THE COMMONWEALTH OF KENTUCKY

ON APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

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Of Counsel
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THE COMMONWEALTH OF KENTUCKY

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

PETITION FOR REHEARING

PETITIONERS George H. Taylor, Maude T. Montgomery, Marie A. Leitch and Julia M. Taylor, appellants in *Taylor and others* v. *Kentucky*, No. 611, October term,

1957, pray that this Court will grant a rehearing upon its order of January 20, 1958, dismissing their appeal for want of a substantial federal question. This for the following reasons:

IT IS NOT DISPUTED, indeed the Court below so held[1] that section 4076h[2] of the Kentucky Forfeiture Act of 1906 gave petitioner George Taylor and claimants of his class the right under that section to a sale of the lands not already vested in the "occupants" by section 4076g[3].

Had he appeared seasonably in the case at bar he could have exercised that right; indeed, it was the primary object of the motion he filed in it in 1955[4].

What prevented his seasonable appearance?

The answer is equally undisputed. He was deprived of notice of this action by fraud[5], perpetrated by or through the Commonwealth's Attorney, the officer whose statutory duty it was to swear to the originating petition in the trial court and to conduct proceedings therein[6].

Thus judgment rendered in the court below in favor of Kentucky was founded on the fraud for which its own officer was responsible.

The answer below was that Taylor could or should have known of the existence of the case at bar when it was

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[1] Jurisdictional Statement, Ap. B, p. 11-12
[2] Jurisdictional Statement, Ap. G, p. 28
[3] Jurisdictional Statement, Ap. C, p. 28.
[4] Record, pp. 26-27.
[5] Jurisdictional Statement, pp. 7-8.
[6] Jurisdictional Statement, Ap. C, p. 22

brought. But this is to disregard the realities of the case, in fact to make sport of Taylor.

The patent lies in four counties:[7] Floyd, Pike, Knott and Letcher and this case could have been brought in any one of them[8].

Thus, according to the opinion below, in order to avoid proceedings against himself *without process*, Taylor (a resident of Virginia) would have had to maintain counsel or other representatives to watch proceedings and posting at all four county seats[9].

Taylor knew of course of the old Pike County suit instituted in 1907. He may even, though he was resident in a different Federal circuit, have known of *Pen-Ken v. Warfield*, mentioned in the opinion below—Jurisdictional Statement, Appendix A, pages 4 & 5. No doubt, also, as the court suggested, other factors were present leading him to expect litigation over the patent in Floyd County or two or three counties besides. Actually all he could do about it, however, in order to meet the extraordinary standards of care set up by the opinion was to keep a permanent eye on the dockets of the several courts in which the patent lies. This of course amounts to subjecting him to precisely that degree of total responsibility against which it has been hitherto supposed that it is the constitutional function of procedural due process to protect him.

In short, as has been pointed out, the person least protected by the requirements of process, and most vulnerable

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[7] Jurisdictional Statement, Ap. A, p. 3 (opinion below).

[8] Section 4076d, Jurisdictional Statement, Ap. C, p. 22.

[9] Or at any rate three of them, if the earlier *Pike County suit* (Record, p. 5) forfeited *all* the patent in that county (Please see opinion below, Jurisdictional Statement, Ap. A, p. 3).

to fraud in this aspect, was the person—Taylor—with the greatest interest in the property.

This is a necessary corollary of the holding of the Kentucky court and a clear indication that it was determined that Taylor must not recover in any event.

Moreover, petitioners have been twice refused oral argument before the court below[10]. It is admitted that this is in accordance with the court's practice[11] but reference may be made to statements of the late Mr. Chief Justice Hughes and Mr. Justice Frankfurter (before his elevation to the Bench) to the effect that oral argument is desirable or necessary for full consideration.

AS AGAINST THE BACKGROUND THUS OUTLINED, the Court is respectfully requested to consider the following quoted holding in *Covey* v. *Somers*[12], *a case in which appeal was permitted:*

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might

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[10] Record, pp. 69, 70, 79.

[11] Rules of Court of Appeals of Kentucky, Rule 1.280: "Oral arguments will be heard on motion of either party or on the Court's own motion in such cases as the Court may believe an oral argument will materially contribute to a proper decision."

[12] 351 US 141, 146.

reasonably adopt to accomplish it". *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306, 314, 315, 94L ed 865, 873, 874, 70 S Ct 652.

> Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement. Assuming the truth of the uncontradicted assertions, that the taxpayer Nora Brainard was wholly unable to understand the nature of the proceedings against her property (from which it must be inferred that she was unable to avail herself of the statutory procedure for redemption or answer), and that the town authorities knew her to be an unprotected incompetent, we must hold that compliance with the statute would not afford notice to the incompetent and that a taking under such circumstances would be without due process of law."

With this should be compared *Nelson* v. *New York*[13] in which written notice of tax foreclosure of real estate (kept from the owner's knowledge by his employee's dishonesty) was ultimately held constitutionally sufficient. *This Court nevertheless found the federal question substantial.*[14]

While the reasons leading the Court to consider a federal question insubstantial are rarely available, so that it is difficult to find general principles by which petitioners might have been guided, it seems equally difficult to distinguish in this respect between the case at bar and the cases just cited, especially the earlier one. Indeed, the case at bar would seem, if anything, stronger. Service here, as is undisputed, was based on deliberate fraud instead of what may, after all,

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[13] 352 US 103.
[14] 351 US 930.

with the authorities of the town of Somers, have been a misconception of their duty. And while in *Covey*, the method of service was a "mere gesture", in the case at bar, it was *active* deception: fraud not only on Taylor but on the court.

It is not easy to conceive of conduct more strongly demanding judicial intervention—not only as clarifying the changing concept of procedural due process but as punishment for flagitious conduct.

FOR THE REASONS SET FORTH it is submitted that the federal question is substantial and petitioners' appeal should be heard.

ALEXANDER H. SANDS

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American Building
Richmond, Virginia
Counsel for Petitioners

I certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ALEXANDER H. SANDS